

NOTICE OF PUBLIC HEARING

A public hearing will be held on Monday, February 7, 2005, at 8:30 a.m. at 830 Punchbowl Street, Rooms 310 and 313, Honolulu, Hawaii 96813.

Pursuant to Section 91-3, Hawaii Revised Statutes (HRS), notice is hereby given that the Department of Labor and Industrial Relations, Disability Compensation Division, will hold a public hearing to amend the Administrative Rules in Chapters 12-10, 12-14, and 12-15 relating to the workers' compensation law, vocational rehabilitation under workers' compensation pursuant to section 386-25, HRS, and the Workers' Compensation Medical Fee Schedule. The proposed changes will establish procedures to simplify and clarify the rules relating to the workers' compensation law, vocational rehabilitation, and the workers' compensation medical fees and services.

The following is a summary and justification for each of the proposed amendments.

1. **Subchapter 1, §12-10-1 Definitions** is amended as follows:

- (a) **"Able to resume work"** is amended by deleting the reference to temporary total disability benefits shall not be discontinued based solely on the

injured worker's inability to perform light work. The current definition states that if an injured employee is unable to perform offered light work, temporary total disability benefits shall not be stopped based solely on this inability to perform light duty work. The justification is to remove superfluous language that detracts from the intent of the definition.

- (b) "**Attending physician**" is modified to include the definition of physician, as defined in section 386-1, as the person who is primarily responsible for the treatment and direction of care of a work injury. The current definition of attending physician does not make reference to the definition of "physician" in section 386-1 and does not specify that the attending physician should be responsible for the direction of care of a work injury. The justification for this proposal is to ensure that any attending physician be a physician as defined in section 386-1 and be responsible for the direction of care for the injured worker.
- (c) "**Days**" is added to mean calendar days, unless otherwise provided. Certain sections do not

specify if working days or calendar days should be used. The justification for this proposed change is to clarify that if the statute and rules do not specify "working days", then "calendar days" should be used for all references to "days".

- (d) "**Disciplinary action**" is added to mean any action taken in good faith by the employer relating to or used for discipline. Disciplinary action shall include the actual sanction imposed upon a claimant for the purpose of discipline, as well as any action taken in good faith by an employer that is a part of the disciplinary process, even if no sanction or punishment is ultimately imposed. The justification for this proposed change is to clarify disciplinary action as used in section 386-3.
- (e) "**Good cause**" is added to mean a compelling reason for failing to perform an act required by law, unless otherwise provided. The justification for this proposed change is to clarify good cause as used in the statute and regulation.

2. **Subchapter 2, §12-10-21 Disabilities** is amended by requiring the attending physician certify that the injured employee was not able to complete their work shift on the date of injury. Currently, if the injured employee is unable to complete their work shift on the date of injury, this date of injury is considered the first day of disability and is counted as the first day of the waiting period. The justification for this change is to require proof of disability that the injured employee was unable to complete their work shift on the date of injury.
3. **Subchapter 3, §12-10-65 Deposition** is amended by renaming this section **"Discovery"** and adding new rules and procedures for the process of discovery in workers' compensation cases. Currently, there are no rules relating to the discovery process as a whole. The justification for this section is to provide rules and procedures for discovery in the workers' compensation process.
4. **Subchapter 3, §12-10-66 Subpoenas** is amended by deleting the current rules relating to subpoenas and inserting the subpoena rules in section 12-10-65 under Discovery. This section will be renamed **"Alternative Resolution"** and will include new rules and procedures

relating to alternative resolution and mediation in workers' compensation. These rules are added to allow alternative resolution and to clarify that mediation may be used to resolve controversies in the workers' compensation system.

5. **Subchapter 3, §12-10-67 Witness fees** is repealed.

These rules will be included in the Discovery section under §12-10-65 to consolidate all rules relating to the Discovery process.

6. **Subchapter 3, §12-10-69 Attorney's fees** is amended by clarifying factors which the director considers in determining an attorney's approved hourly rate and the number of hours allowable in approving attorney's Requests for Approval of Attorney's Fees. The amendment also caps the maximum allowable attorney's fees to be no greater than 15% of the benefits awarded to claimants. The justification for this amendment is to clarify some of the factors considered in approving attorney's fee requests. The current process of establishing attorney's fees is not objective and does not present clear guidelines for establishing appropriate fees for attorneys. It also provides a maximum fee so claimants will receive an appropriate award they are entitled to and to ensure that not all

of their award will be depleted towards attorney's fees.

7. **Subchapter 3, §12-10-72.1 Hearings Process** is a new section added to describe and clarify the hearings process to include such items as requests for hearings, response to application for hearing, evidence at hearings, witnesses at hearings, continuance of hearings, and submission of reports. This section also clarifies the powers and duties of the hearings officer and requires that all hearings will be electronically recorded. This amendment also provides that if there are no material facts in dispute, decisions may be rendered based on the records without a hearing. The justification for this section is to clarify the hearings process and the duties of the hearings officers. It also facilitates delays in the system by allowing decisions based on the record if there are no material facts in dispute. This hearings process is intended to be transparent and to provide all parties with a clear understanding of the process and timetables. There are currently no administrative rules governing the hearings process. This has made the hearings process unpredictable, provides an appearance of favoritism with regard to

calendaring of hearings, and inefficiency in resolving claims in a timely manner.

8. **Subchapter 4, §12-10-94 Self-insurance; application; duration; cancellation; revocation** is amended to clarify and provide a more detailed description of the process and requirements for qualifying and obtaining a workers' compensation self-insurance authorization. Justification for this amendment is to assist employers who are contemplating whether or not they qualify for workers' compensation self-insurance and to provide guidelines to apply for self-insurance.

9. **Subchapter 1, §12-14-1 Definitions** is amended as follows:

- (a) **"Usual and customary employment"** is added to mean the job performed at the time of injury. The term "usual and customary" usually refers to the job that claimant was injured at. Many claimants now have more than one job (concurrent employment) and by defining the term, it will lessen any confusion as to what job is in question.

- (b) **"Suitable gainful employment"** is amended to exclude vocational or academic instruction specifically designed to make the employee self-

employed from suitable gainful employment. Age, education, previous work history, interests, and skills of the injured employee are major factors that are considered when assessing the injured employee's feasibility of returning to the workforce as quickly as possible in the most cost effective manner. Since it is often costly to set up a new business and difficult to determine immediate success of self-employment, self-employment will no longer be considered an option in returning the employee to suitable gainful employment.

- (c) **"Vocational rehabilitation plan"** is amended to clarify that vocational rehabilitation plans must be approved by the employee and the director. The current rule only indicates that the vocational rehabilitation plan would be prepared by the vocational rehabilitation counselor with the employee. It does not clarify that the employee and the director must approve the plan as well. This amendment also seeks to include the employer in the process of the planning and approval of the vocational rehabilitation plan.

(d) **"Vocational rehabilitation services"** is amended to include job modification and on the job training as services to be provided by the vocational rehabilitation counselor to assist the injured worker back to the workforce.

10. **Subchapter 2, §12-14-4 Initial evaluation required prior to submittal of vocational rehabilitation plan** is amended to reduce the deadline to submit an initial evaluation to thirty days, to expand the eligibility process, and to add an opportunity for the employer to object to the initial evaluation. The current administrative rules require an initial evaluation within forty five days, is not clear who is eligible for services, and does not allow an employer to refute an employee's eligibility.
11. **Subchapter 2, §12-14-5 Criteria for an approved vocational rehabilitation plan** is amended to require plans within forty five days, limit the length of the plan to 104 weeks, and eliminate self-employment plans. The current administrative rules do not specify a deadline for the submittal of plans, do not limit the length of plans, and allow self-employment plans.

12. Subchapter 2, §12-14-8 Director's action against a certified rehabilitation provider with an unapproved plan is amended to order termination of services in cases with an unapproved plan. The current administrative rules allow the director to use his discretion on whether services are appropriate or not.
13. Subchapter 2, §12-14-10 Vocational rehabilitation plan, revision, or modification considered approved if no action is taken by the director on objections is amended to extend the time required to object to a plan to fourteen days and to repeal the default of a plan. The current administrative rules require an objection within ten days and allow plans to be approved if no action is taken.
14. Subchapter 4, §12-14-23 Responsibility is amended to clarify the term "physician", to allow information from other physicians directed by the attending physician, and to extend the time required to object to a referral to fourteen days. The current administrative rule uses the term "physician" rather than "attending physician", limits information to the physician, and requires an objection within ten days.

15. **Subchapter 5, §12-14-30 Closing report** is amended to require a determination regarding an employee's ability to return to work. The current administrative rule does not require a specific statement regarding an employee's ability to work.
16. **Subchapter 9, §12-14-48 Reconsideration and hearing** is amended to extend the time required to submit a request for reconsideration to twenty days, to require that arguments to support a request for reconsideration be included, and to refer requests for reconsiderations to the Hearings Branch. The current administrative rule requires a request for reconsideration be filed within ten days, does not specify that arguments be included, and does not refer the matter to a hearing or administrative decision.
17. **Subchapter 9, §12-14-49 Appellate body and filing period** is amended to eliminate requests for reconsideration for Hearings Branch decisions and refer the matter to the Appeals Board. The current administrative rule requires the Hearings Branch to review requests for reconsiderations for decisions.
18. **Subchapter 1, §12-15-1 Definitions** is amended by adding new definitions as follows:

- (a) **"Emergency medical services"** to mean "initiating all basic life support care as well as invasive patient care designed to stabilize and support a patient's condition due to sudden illness or injury within the first seventy-two hours after date of injury." This is to clarify treatment guidelines as referenced in section 12-15-32 and emergency medical treatment in section 12-15-50.
- (b) **"Evidence based"** to mean "the conscientious, explicit, and judicious use of current best evidence in making decisions about the care of individual injured employees entitled to benefits." This is to clarify treatment guidelines as referenced in section 12-15-32.

19. **Subchapter 3, §12-15-30 Provider of service responsibilities** is amended by amending subsection (d) by clarifying that the frequency of treatment guidelines as specified in the rules are guidelines to improve provider of service accountability and are a presumptive, not authoritative, prescription for health care. Providers of service shall follow the rules as specified in the amended section 12-15-32. The justification for this amendment is to clarify

that providers of service shall follow the frequency of treatment guidelines in section 12-15-32.

20. **Subchapter 3, §12-15-31 Who may provide services** is amended by amending subsection (c) to clarify that all treatment and prescriptions shall be in writing and in accordance with sections 12-15-30 and 12-15-32 relating to providers of service and their responsibilities.
21. **Subchapter 3, §12-15-32 Physicians** is amended and renamed "**Providers of Service**" to combine sections 12-15-32 and 12-15-34 to provide frequency of treatment guidelines for all providers of service. This amendment requires that the Official Disability Guidelines Treatment in Workers' Comp, 3rd edition, (hereafter "ODG") issued by the Work Loss Data Institute and the treatment guidelines, chapters 1-7, issued by the American College of Occupational and Environmental Medicine, 2nd Edition, shall be presumptive. For all injuries not covered by the ODG Treatment in Workers' Comp, 3rd edition, treatment shall be in accordance with evidence based medical treatment guidelines. The attending physician shall submit a "Restorative Services Plan" on a form prescribed by the department. If the attending

physician believes additional treatment is required, the attending physician shall mail a treatment plan to the employer at least fourteen calendar days prior to the start of the additional treatments. With the exception of emergency medical services, any provider of service who exceeds the treatment guidelines without proper authorization shall be denied compensation for the unauthorized services.

Currently, frequency of treatment guidelines for physicians are listed in section 12-15-32 and frequency of treatment guidelines for providers of service other than physicians are listed in section 12-15-34. This amendment will combine both sections for clarity and consistency in treatment guidelines for all providers of service. The justification for this amendment is to establish uniform treatment guidelines for all providers of service to treat injured workers. This will ensure consistency in treatment and medical billing for similar types of injuries from all providers of service.

Since 1995, Hawaii has seen an increase in the amount of time it takes to return injured workers back to the workforce. This has unnecessarily increased costs onto the system, causing rates to increase and

delaying the ability of the injured worker to return to work. This amendment will ensure that Hawaii's injured workers will receive quality medical care. Treatment guidelines will also ensure that treatment is not over utilized and that the injured worker will be able to return to work in an appropriate timeframe, to ensure that they are not overburdened economically by delay in treatment and care.

22. **Subchapter 3, §12-15-34 Providers of service other than physicians** is repealed. Frequency of treatment guidelines for all providers of service will be listed in section 12-15-32 for consistency and clarification.
23. **Subchapter 3, §12-15-50 Emergency treatment** is amended by amending subsection (c) to clarify that emergency treatment is considered to be treatment for a life-threatening condition which must be performed immediately or within seventy-two hours from the end of the workday shift on date of injury. Currently, emergency treatment includes treatment within fourteen calendar days of the injury. Since emergency care is most crucial in the initial seventy-two hours after the accident, the time period for emergency treatment is shortened to reflect this seventy-two hour period.

24. Subchapter 4, §12-15-85 Rules for allowable fees for medical, surgical, and hospital services and supplies is amended by amending section (h) to clarify how the providers of service may certify their billing that they are treating a work injury or illness. This is to verify that the provider is treating a work injury and billing in accordance with the workers' compensation law and related rules.
25. Subchapter 4, §12-15-94 Payment by employer is amended by penalizing the providers of service one dollar per charge that is billed incorrectly. Currently, if the charges are billed in excess of Medicare plus ten percent or in excess of Exhibit A in the Workers' Compensation Medical Fee Schedule, the insurance adjustors may adjust the charge to the maximum allowable charges under the workers' compensation medical fee schedule. This amendment is to require the providers of service comply with the Workers' Compensation Medical Fee Schedule.

Interested persons are invited to present their views at the public hearing and to submit written testimony on or before the date of hearing. Five copies of the written

testimony must be made available to the presiding officer at the public hearing.

Copies of the proposed amendments may be obtained from the internet at www.dlir.state.hi.us. At the request of any interested person, a copy of the proposed administrative rules will be mailed upon payment in advance for the copy and postage. You may call (808)586-9151 for further information. The proposed rules may also be reviewed in person through February 4, 2005, from 7:45 a.m. to 4:30 p.m., Monday through Friday, at the following locations:

Oahu	830 Punchbowl Street, Room 209, Honolulu
Kauai	3060 Eiwa Street, Room 202, Lihue
Maui	2264 Aupuni Street, Wailuku
Hawaii	75 Aupuni Street, Room 108, Hilo
	81-990 Halekii Street, Room 2087, Kealahou

Auxiliary aids and services are available upon request, call the Disability Compensation Division at (808) 586-9151 (voice), (808) 586-8847 (TTY), or 1-(888)-569-6869 (TTY neighbor islands). A request for a reasonable accommodation(s) should be made no later than ten working days prior to the needed accommodation(s).

It is the policy of the Department of Labor and Industrial Relations that no person shall on the basis of

race, color, sex, marital status, religion, creed, ethnic origin, national origin, age, disability, ancestry, arrest/court record, sexual orientation, and National Guard participation be subjected to discrimination, excluded from participation in, or denied the benefits of the department's services, programs, activities, or employment.

NELSON B. BEFITELE, Director

Department of Labor and Industrial Relations